The King’s Many Bodies: The Self-Deconstruction of Law’s Hierarchy

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The article contains two strands of the recent sociological debate: (1) the empiricist discovery of new forms of quotidian law in the course of globalization, and (2) the emergence of deconstructive theories of law that undermine the idea of law. The article posits the thesis that law’s hierarchy has not only refused to yield to globalization, it has, however, and the presence of globalization that produced a global law without law, as offered by global society that has no meaningful distinction between public and private. Consequently, the article criticizes deconstructive theories for their lack of any view of society. These theories do not take into account the historical conditions of deconstruction. Accordingly, deconstructive analysis of law would have to look for new legal distinctions that are possible under the new conditions of a post-ideological society. The article enunciates the contours of an emerging postconstitutional law.

I. Deconstructing Systems

A fter deconstruction, what is left of law as a hierarchy of rules, founded on a political constitution, endowed with an institutional identity, based on the distinction between legislation and adjudication and legitimated through democratic representation and constitutional rights? Derrida (1996) uses the conceptual tools of deconstruction to dismantle the political architecture of the legal system:

Deconstruction is generally practiced in two ways: (1) one reads, although it must often read one to the other. One takes the demonstrative and appropriately ahistorical allusion of logos, of the paradigm. The other, more historical, or more archaic, seems to proceed through readings of text, meridians interrelations and genealogies. (Derrida, 1996:597, 305)

For critical comments I would like to thank Linda Farnell, Nicola Luca, Tim Mees- phy, Alex Pottage and Simon Scholz. Address correspondence to Gunther Teubner, Law Department, London School of Economics and Political Science, Houghton Street, London, WC2A 2AE England (email: g.teubner@lse.ac.uk).

Law & Society Review, Volume 31, Number 4 (1997). © 1997 by The Law and Society Association. All rights reserved.
Deconstruction reveals the foundation of law, the origin of its authority, to be a grotesque logos-ontological paradox. Law is grounded only on itself, based on an arbitrary violence without ground, "la fondation mystique de l’autorité." Nor does the genealogy of legal decisions reveal law’s stable identity as a system of valid rules, but only exposes law’s recurrent aporias, situations of undecidability with ever-shifting unclear differences in changing historical contexts. Law becomes a deconstructed domain of disjunctive fragments which at the same time is haunted by the never-satisfaction-specter of justice.1

At first sight, systems theory stands in stark contrast to the intentionally obscure language of deconstructivism, which is not willing to reveal its theoretical presuppositions. The contrast holds true for style as well as for substance. While deconstructivism refuses to define a specific method to determine a guiding theoretical vacation (Derrida 1988-82), systems theory itself as an order theory cultivating conceptual precision and elaborating systematic theory constructs.2 In substance, the theory of law as an autopoietic system stresses law’s autonomy, its normative closure, structural determinism, dynamic stability, emerging eigenvalues in binary codes and normative programs, and its reflexive identity.3 How does this theory respond to the challenge of deconstruction? Is the radical constructivism of autopoietic law the very counter-program to anti-metaphysical deconstructivism?4

2 By a systematic presentation of the theory of social systems, which criticized a concise definition of autonomous, see, thereubia, 1993;
3 A useful introduction to the history of systems and autopoiesis can be found in King & Levin 1996. For an overview of systems, see, thereubia, 1993;
4 For a definition of this concept see Restler 1981; for its relation to deconstruction, see, thereubia, 1993; for its relation to law, see thereubia, 1999; & to the reader, 1993. 

3 For a definition of this concept see Restler 1981; for its relation to deconstruction, see, thereubia, 1993; for its relation to law, see thereubia, 1999; & to the reader, 1993.
contents (Teubner 1997a). Diverse contexts constitute multiple fictions of law, whether they fictionalize law as an effective instrument of political change, or as a noble disciplinary weapon in capillary micro-political power relations, as a structural basis of institutionalized power politics, as a stable normative framework for economic action, as an efficiency-enhancing tool, as a principled moral enterprise, a system of adumbrations, or as a rule system that clutches formal validity. Law's constructed identities change: channelized like (as change of observation post, each of which has an equally valid claim to truth. There is no stable predefined identity to the legal system but rather a multitude of conflicting identities that are constructed in different contexts of observation. Law is the same and it is not the same. So what's the difference between constructing and deconstructing legal systems?

"Paradigmatic" is the second answer to decomposition (Luhmann 1992a). The prominent place given to unsettling paradoxes by systems theory may again come as a surprise, given the value that theory places on concepts, forms, and systems, though systems theory does not accept at face value the self-legitimation of contemporary law as a hierarchy of rules where the lower normative acts are legitimized by different levels of higher rules that finally end in the constitutional legitimation of political sovereignty. Nor does systems theory accept the sovereignty claims of law's empire to legal integrity according to which the interpretive interplay of principles and rules allows for the one right solution (Dworkin 1986). Rather, it reveals that law's hierarchy is in reality a self-reflexive circularity where validity becomes a circular relation between rule making and rule application (Luhmann 1987). The hierarchy of law appears both extended and reversed, much like Diamon's affirmative treatment and Derrida's deconstructive treatment of hierarchies (Ducru 1990). Moreover, the self-reflexive character of legal operations, the recursive self-application of legal acts to the results of legal acts, leads directly into perpetuating paradoxes of self-legitimacy. The binary code of law, the distinction between legal and illegal acted upon itself, results in a paradoxical oscillation that paralyzes the observer (Teubner 1993b, pp. 1). Systems theory sees the whole impressive apparatus of the legal order with its institutionalized code and programs as founded on a paradox, on the violence of an arbitrary distinction.

Combining both aspects, systems theory reveals the impenetrable web of layers of codifying authority in the customary reality of a trompe l'oeil. The King's Two Bodies—the grandiose chronicle fiction of the immortal Sovereign

For an analysis of its central role of paradoxes in the history of law, see Luhmann 1987
“above” the mortal human being as the supreme source of law (Kastorovics 1957)—have protected the law against the deconstruction of its foundation and its identity. The contradictory multiplicity of law’s identities and the founding paradox of law are both to be found hidden behind the façade of law’s hierarchy at the top of which the King’s Two Bodies are governing law’s empire. The constitutional law construction of the political democratic sovereign as the top layer of law’s hierarchy has allowed the law to externalize its threatening paradox and to hand it over to politics where it is “resolved” by democracy. This externalizing manoeuvre by constitutional lawyers is equivalent to Hans Kelsen’s (1971) attempt to externalize the founding paradox of law into the transcendentalism of the Grundnorm and to H. L. A. Hart’s (1961) attempt to conceal it in the social acceptance of the ultimate rule of recognition. Similarly, the multiple identities of law, the uses different social contexts make of it, are no longer a matter for the responsibility of law but for democratic politics.

Again, what is the difference between constructivism and deconstruction? Contrary to the superficial view that is content to contrast the ontological gesture of deconstruction with the top-down rationalism of systems theory, a closer look reveals how strikingly similar they are in their theory design. Both are theories which, while rejecting unity, identity, and synthesis, begin with difference and end with difference. Both theories share a postmetaphysical, postideological, and poststructuralist character. “Systems theory and deconstruction have equally abandoned . . . transcendental philosophy, ontology, hermeneutics, centering the subject, binary logic (including the supposition of circularity in argumentation)” (Habermas 1996:284, author’s translation).

Most of the oscillating concepts of deconstructivism find their stable counterpart in the theory of autopoietic Difference and the difference-creating cascades of distinctions in various contexts; identical and the recursive self-application of distinctions that are simultaneously the same and not the same; presence/ absence and the inclusion/exclusion of systems of distinctions; supplément and the blind spot of distinctions, the invisible parasite, violence de la formation and the arbitrary beginning of auto-poleis.1 It is as if simultaneous (in)dependent inventions have been made in Paris and Bielefeld.

Deconstructing systems—the eunuch unites both theories. But here is also the point where the bifurcation begins. It is the second meaning of “deconstructing systems” that separates them and puts them on very different tracks. Systems theory places special emphasis on the second meaning. Not only are systems “passive” objects of deconstruction, systems are themselves “active”

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subjects of deconstruction and, most important, of self-decon-
struction. I would even go further: I would submit that the
deconstruction of systems could not work without their self-
deconstruction.

Systems theory does not accept the usual critique that decon-
structionism is too destructive, nihilistic, critical, radical. Quite the
contrary. Deconstruction is not sufficiently critical, not radical
enough! In several respects, deconstructionism does not go far
enough in ruthlesslly pursuing its own enterprise. It stops short of
drawing consequences from its dissolution of stable systems into
paradoxes and multiple identities. It remains in the suggestive
and seductive ambiguities and ambivalences of the paradox ex-
posing itself to the infinite demands of a transcending (altruism
justice, generosity, friendship, democracy, . . .) which remain,
however, forever indecipherable. From a systems perspective,
deconstruction looks a lot like modernity’s carnival, a funny,
ex-citing, and at the same time sad and desperate reversal of its tan-
gled hierarchies, but basically an entertaining enterprise without
consequences, in its negative mirror image of entangled and re-
versed hierarchies ultimately affirming the order of modernity.

In what ways does deconstruction of law not go far enough? I
see three roads that have not been sufficiently explored by a
deconstructive analysis of law:

1. Lack of autologies which results in concealing that a
deconstruction of law is possible only as law’s self-
deconstruction.

2. A performative contradiction in the deconstructive
gesture, a fascination with the paradoxes that inhibit the
deconstruction of the paradox itself, making
deconstruction reluctant to take the risk of decon-
structible unfoldings of paradoxes.

3. Elective affinities between legal semantics and social
structures that make it possible to go beyond purely
semantic deconstruction and to produce some knowl-
edge about the post-deconstructive reality of law.

II. No Consequences

Deconstructivism is perhaps the most perplexing but not at
all the first intellectual movement to challenge law’s hierarchy.
The classics of legal sociology, Karl Marx, Max Weber, Eugen
Ehrlich, as well as today’s theories—of legal pluralism, legal insti-
tutionalism, critical legal theory, economic analysis of law, theo-
ries of private government, theories of legal self-reference—have
all attacked law’s hierarchy with the King’s Two Bodies reigning
in its upper chambers. All this to no avail, the King’s Two Bodies
carrying on regardless. All attacks on them turned out to be un-
terly unsuccessful in the institutionalized practices of law (Wierzblick 1986:53; Heller 1985:185). Whatever the nagging doubts within legal theory, legal practice is still reproducing its operations, interweaving them into an ordered hierarchy of rules that draws its legitimacy from a political (written or unwritten) constitution. Despite all contextual relativization, legal practice continues to ascribe to itself an autonomous identity, to use the institutionalized distinction between legislation and adjudication, and to legitimate itself by the appeal to democratic representation and constitutional rights. It seems that the relentless deconstruction of law has no consequences (Fish 1989). The remarkable thing is that law’s hierarchy has survived and probably will survive all subversive discoveries of its tangled, circular character, all undermining revelations of its paradoxical foundations, all disconcerting contradictions of multiple identities—if these discoveries are not accompanied by the self-deconstruction of legal practices themselves.

Let me illustrate this with an example, the law of “private govern- ments.” What happened here to the attempts of deconstructing law’s hierarchy and the unity of state and law? Classical doc- trine of legal sources, not in its sense as a jurisprudential construct but as the “working theory of practice,” as a set of dis- tinctions inscribed in the everyday work of legal institutions and effectively used in the ongoing practice of legal reasoning, ig- nored the phenomenon. According to the traditional doctrine of legal sources, normative phenomena outside the legitimating hi- erarchy, so-called private regimes of normative regulation, are nonlegal—Savigny said so (Savigny 1849:12). They may be any- thing—professional norms, social rules, customs, usages, contract- ual obligations, intra-organizational or inter-organizational agreements, or arbitration awards—but never law. The distinc- tion law/nonlaw is based on law’s hierarchy of rules where the higher rules legitimate the lower ones. Normative phenomena outside of this hierarchy are not law, just facts. After the decline of natural law, the highest rule in our times is the constitution of the nation-state—whether written or unwritten—which in its turn turns to democratic political legislation as the ultimate le- gitimation of legal validity. In spite of recurrent doubts voiced by various movements in legal theory, judicial adjudication is still seen as subordinated to legislation. And in spite of even stronger recurrent doubts, contractual rule making as well as intra-organi- zational rule production is still seen either as nonlaw or as dele- gated lawmaking that must be recognized by the official legal or- der. Rule making by “private governments” is thus subsumed under the hierarchical frame of the national constitution that represents the historical unity of law and state.

And it is not the recurrent theoretical critique of law’s hierar- chy but historical developments in the practice of law that are
new breaking this frame. The name of the great paradoxes is neither Jacques Derrida nor Niklas Luhmann. In its name is "globalization." The recurrent doubts about law’s hierarchy so easily silenced in the nation-states’ past can be silenced no more. They explode in the face of the "statelessness" of lex mercatoria and other practices that produce global laws without the state (Treuber 1997a). It is globalization of law that is killing the sovereign father and making the legal paradox visible. The most successful law of a state has been lex mercatoria, a transnational legal order of global markets that has developed outside national and international law. Multinational enterprises now arrive at contracts which they submit neither to national jurisdiction nor to national substantive law. They agree on international arbitration and on the application of a transnational commercial law that is independent of any national law. Among legal practitioners this has created great confusion. So ber lawyers become very emotional when they have to judge the monstrances of an "international" legal order: It is difficult to imagine a more dangerous, more undeniable and more ill-founded view which denies any measure of predictability and certainty and confines upon the parties to an international commercial contract or their arbitrators powers that no system of law permits and no court could exercise. (Manno 1984:197)

Practitioners of international commercial law are involved in a battle about fundamental questions: Should national courts recognize lex mercatoria’s "private justice" as a new positive law with casuistical validity? Could such an ambiguous normative phenomenon which is between and beyond! the laws of the nation-states and at the same time "between and beyond" law and society be applied by arbitration bodies according to the rules of the law of conflicts? Does it contain distinct rules and principles of its own? Obviously, a new legal practice has been established with its own substantive law and its own judge made law that cannot be integrated in the traditional hierarchies of national and international law. The "globalization" of law concept is somewhat misleading. It seems to suggest that a multinational legal system is a unified global legal system. It is more appropriate to speak of world-wide legal state from the mistakes when legal communication takes place on a global scale. National legal orders in their turn are no autonomous legal systems rather they are forms of territorial differentiation of worldwide legal communication (see Luhmann 1986:217ff; Schjilt 1997). For analysis of the actual impact of globalisation and law, see DeCerte 1993, Schilt 1995, Eitken 1995. Freedman 1996, Perrott 1999.

I should like to add that globalization is not the only paradox of law’s hierarchies. Here I use as one paradigm case for an external irritation that irrigates law’s self-deconstruction for other historical occasions which made law’s paradox visible, see Luhmann 1986.


international law. Compared with contracting practices within national law, what is new is not that private governments produce their own laws. Rather it is that they evade the regulatory claims of national and international law and practice a legal sovereignty of their own. This is the decisive difference between lex mercatoria and other contractual forms which forces legal practice either to loosen the connection of its operations to the legal hierarchy or to declare the whole phenomenon as nonexistent.

However, lex mercatoria, the transnational law of economic transactions, is only one of the numerous cases of a global law where the Political Sovereign has lost his power. It is not only the economy but also various sectors of world society that are developing a global law of their own. And they too are using international law in a "relative insolation" from the state, from official international politics and public international law. Internal legal regimes of multinational enterprises have developed into impressive bodies of global law without a state (see Robé 1997; Muchlinski 1997). A similar combination of globalization and statelessness can be found in labor law: the so-called international labor standards and labor unions as private actors are the dominants (see Bercrombie 1997). Technical standardization and professional self-regulation have developed similar tendencies toward worldwide coordination with official intervention of official international politics. Human rights discourse has become globalized and is pressing for its own law, not only from a source other than the states but against the states themselves (Bianchi 1997). Especially in the case of human rights it would be "unbearable if the law were left to the arbitrariness of regional politics" (Luhmann 1993:574ff, author's translation). In the world of telecommunications, we experience the Internet struggling for its own global legal regime. Similarly, in the field of ecology, there are tendencies toward legal globalization in relative insolation from state institutions. Even in the world of sport, people are discussing the emergence of a de oblitera internationalis (Simion 1990; Nafziger 1996).

While postmodern legal theorists claim to have revealed the paradoxical foundations of law (Kerckhoff & Ot 1992), they would do better to make the "material basis" responsible for the revelation and not the "superstructure." Their blind spot in a conspicuous lack of autologies that makes them fail to analyze the historical conditions of their own critique. Deconstruction is a universal method which means this virtually any identity, any syst...
tem, any distinction can be deconstructed. This raises then the question under what historical conditions deconstruction actually has social effect in its dissolution of identities and its revelation of paradoxes and under what conditions it does not. It seems that deconstruction needs to historicize itself and ask why it has emerged as a successful intellectual strategy which reno-
nates in society at the end of the 20th century (Luhmann 1993b:490).

Having undertaken such an autological analysis, deconstructiv-
ism would have to admit that it is a consequence of crucial historical developments in society and culture making such per-
plicating and paralyzing paradoxes visible. These developments create the structural conditions so that at a certain historical mo-
ment, law’s foundations are suddenly seen as paradoxical, among others but by no means exclusively by deconstructivists. The para-
doxes of law could have been revealed at any time in legal his-
tory—and actually they have been; however, they had been well concealed in socially accepted hierarchical relations. They come to the fore only under certain historical configurations when the ways of concealing them lose their plausibility in the web of other
distinctions, when this web is being torn apart, making the foiling paradox reappear.

In our case of lawmaking without the Sovereign, for centuries the strange paradox of self-validation of contract and organiza-
tion has remained in a strange twilight. Such phenomena were known jurisprudential conundra, but they remained latent. To be sure, noncontractual foundations of contract and nonor-
ganizational foundations of organization have been politicized by Hobbes, historicized by Savigny, and socialized by Durkheim. But these problems have not been really resolved, rather they have been suspended and maintained in their latency. The reasons for this latency are historical. The nation-state, its constitution, and its law have provided for the safe distinction between legislation and adjudication that was apparently able to absorb all forms of “private lawmaking.” They repel contractual and organiza-
tional autovalidation by their hetero-validation. The King’s Two Bodies were suitably nourished to conceal behind them the two great paradoxes: the paradox of the nonofficial law’s self-valida-
tion; and the foundational paradox of the official law itself. Thus, the emergence of law’s paradoxes was not the ingenious discov-
er of postmodern jurisprudence whose deconstructive tech-
niques reveal law’s aporias, antinomies, and paradoxes. Rather, hard-core social reality made law’s paradoxes visible—in this case: fragmented globalization. It is the difference between a highly globalized economy and a weakly globalized politics that
presses for the emergence of a global law that has no legislation, no political constitution, no politically ordered hierarchy of norms which could keep the coexisting paradigms bent (for more details, see Teubner 1997b). The hierarchy of norms did not break under the attack of legal theory, but it does break effectively when it is deconstructed by legal practices themselves.

Perhaps this is one of the greatest difficulties one has to face if one tries to transfer the deconstructive experience from literary criticism and philosophy to institutionalized social practices like law, politics, and the economy. Derrida himself speaks of "base transpositions" and "confused homogenizations" (Derrida 1995: 933). Pierre Schlag tends to think into this direction when he stresses the crucial importance of "L.A. Law" against "Law's Empire," the relevance of institutionalized bureaucratic practices as against conceptual legal doctrines (Schlag 1991:890f.). I see this as an important step to overcoming the sociological "blindness" of deconstruction. There is a sociological supplement which threatens philosophical deconstruction: In systemic terms, the supplement would be the distinction between "observation" and "operation." The object of traditional deconstruction is "Law's Empire," self-observation of the legal system, "pure" social abstractions of law, legal theories and doctrines, normative arguments and interpretations. The disruptive supplement would be "L.A. Law": elementary operations of law, law's "dirty" social practices, the elementary dispositions that effectively change legal structures. And the decisive thing is that these elementary operations are not blind power acts but themselves make use of distinctions. They observe, distinguish, and indicate; they connect worlds of meaning—and deconstruct them. The play of differences takes place not only in the argumentative practices of legal self-observation but also in the core operations of legal self-reproduction. And if deconstruction and self-deconstruction are to occur, they need not only to reach the legal interpretation of texts but also to connect up with those institutionalized hard-core operations of the law itself. Look at our example of rule hierarchy again: While legal theory has limited its deconstructive efforts to concepts of legal hierarchy developed by legal theory and doctrine, today's globalisation of law is deconstructing the operative hierarchy itself. The self-reproduction of law's hierarchy, questioned for decades by legal critique, effectively breaks down under the pressures of globalisation.

However, the questions for deconstruction as a quasi-transcendental theory are: How much does it cherish its own blind spot? Is it bound to refuse an autological optics which would allow it to see in its own historicization? Is this theory imprisoned by its self-limitation to texts and intertextuality? Indeed, Drucilla Cornell's distinction between systemic theory and deconstruction tends to dismiss a sociological (self-)elimination as deconstruct-
vian: "In terms of the relationship between sociology and a quasi-transcendental analysis such as Derrida’s philosophy of the limits, the understanding of deconstruction has led to the inscrutable conclusion that sociology, even its most sophisticated forms, such as Luhmann's systems theory is misguided" (Cornell 1992b: 150).

And Cornell herself makes a rather limited use of sociological theory to reveal the perseverence of violette in "social reality" instead of exploring its liberating sociological potential.

III. After Deconstruction?

If I try to understand with empathy the "ambience" of legal deconstructionism, I cannot help but sense a strange feeling of naivety, deferral, b técnica, even a kind of paralysis, in all the frantic moves and countermoves on justice as the possibility of deconstruction of law and vice versa. Deconstruction changes places and dances together with other unstable indicators, such as difference, race, gender, supplication, race, and merge around a center which can no longer be characterized as either present or absent. It is like something around the golden calf while knowing that an unqualified grid has already been invented. Or, in simpler terms, does deconstruction the self-organiza-
tion of this dance, complaining about a lost tradition and be-
coming, by this very complaint, dependent upon this tradition, as it cannot decide and need not decide whether such a center is or is not present? (Luhmann 1990a: 366).

"Law and the postmodern mind" seems to be caught in a
performative contradiction. While relentlessly deconstructing, it is falling in love with its object of deconstruction. Is the postmodern mind trapped in a false relation to the decon-
structed "thing" which makes it impossible for it to suffer the loss of this thing and stop it from getting rid of this beloved object to make the liberating move beyond?

In recent postmodern legal writing—especially that of
Ducille Cornell, Jack Balkin, Constan Donginos and Ronnie War-
rington—you can sense a suffering from this self-inflicted paralysis and at the same time a strong desire to make the liberating post-deconstructive move. The question is only: In what direc-
tion? With growing insistance they experience the open epistemolo-

gical situation in which meaning worlds and knowledge weirs are arbitrarily invented, varied, collapsing, reinvented, varied, collapsing . . . . "If you experience that such an infinity is a dead end then you search for indicators for steps beyond the diffuse-
ness which should not be a regressive in the space of the mean-
ingful world" hermeneutics" (Gombrich: 1991: 848; author's translation).
Jack Balkin’s “transcendental deconstruction” is one attempt to overcome the shortcomings of deconstruction. Ultimately he "relies on the existence of human values that transcend any given culture" (Balkin 1994:1138; 1995:124±27; 1987:765). Deconstruction becomes for him nothing but a "rhetorical practice that can be used for many purposes depending on the political choices of the ‘deconstructors,’ among them the choice for those values. It therefore has the ‘normative chain between intrinsic human values and their cultural articulations’ (1994:1177; emphasis omitted). Thus, justice can never be ‘fully’ achieved, however, as he insists against Derrida, this is not ‘infinite’ but only ‘indefinite.’

Jack Balkin, at least, has the courage to face the question. After deconstruction? And he insists on this even if Pierre Schlag (1991:990, 936; 1998:1635) tells him again and again that he is asking the wrong question. But then he falls back upon pre-deconstruction positions: when he relies on quasi-natural law and transcendental existence of values that are only imperfectly articulated. Deconstruction affects everything, not just the politically incorrect distinctions. It is not a technique that ameliorates only my adversary’s arguments and leaves room for my choices. Derrida has often distinguished himself from an instrumental-political use or deconstruction, particularly in his critique of Critical Legal Studies U.S.-American style (Derrida 1986:935). Deconstruction digs deeper and reveals the aporias, antinomies, paradoxes that make even more urgent the demands of justice. In Derrida’s words, there would be the infinite demands of the uniqueness of the Other (not only understanding him, or having empathy with him, or speaking his language, as Balkin has it). Thus, justice is impossible but at the same time cannot be disconnected from law. It is “haunting the law, and the result is not approximation—but provocation!”

Expose the law to Always? This is the route into the aporias of deconstruction that other postmodern writers take, following Levinas’s and Derrida’s instructions. It is the direct experience of the demands of the Other, as a nonlinguistic, noncommunicative, nonmediated perception, the experience of the nonbridgeable alterity, the infinite uniqueness of the Other which throws the objective and general order of law into chaos but at the same time remains there as the continuing call for justice (Levinas 1979; Derrida 1986:9558; 1994:90 n.1026). While Derrida, of course, is rather elusive about where this road leads us, Cornell, Dworkin and Warrington courageously explore this road (Cornell 1992a; 1990:1015; Dworkin & Warrington 1994:ch. 4, 6). Where do they arrive at? At the recommendation that judges take the legitimate concerns of suppressed minorities into account. Ladhae in this as an ethical imperative, as a result of their ambitious theorizing it is somewhat disappointing. Does an
peal for human rights become more convincing after the deour via deconstruction.

There are more fundamental doubts about the combination of deconstruction and alterity to which I can only allude here. Is the uniqueness of the Other indeed the ultimate experience that remains after deconstruction? Sartrean theory would argue that it is rather the experience of the "blind spot" of any distinction that makes the quest for its immanent "inappropriateness" and its transcendent "justice" even more urgent. By no means would systems theory dismiss as irrelevant the question for law's transcendence that it is the core of Alterity. However, this question would be raised not only in relation to human beings in their unique singularity. The fundamental inadequacy of communicative practices not only to the other but to the world is an experience that accompanies it from the beginning. Attention is then drawn to the "injustices" that social discourses, among them law, create for the consciousness and the bodies of people, for the balance of the ecology, and, last but not least, for other communicative prac tices themselves.

To be sure, it is an important move of deconstructive justice to reintroduce boldly the dimension of the sacred into the law. Deconstructive justice cannot be equated with any standard intes nal to the law; at the same time it is not an extralegal political or moral standard. Deconstructive justice does not represent any immanent principle of society. It addresses directly the transcendence of law. By stressing the unbridgeable divide between law and justice and its simultaneous inseparable intertwined, it reformulates a relation of law to the sacred that has been lost with secularization.14 And it is remarkably different from the usual bridging of law and religion, of legal doctrine and theology. Rather, deconstructive justice opens the experience of an a-religious, an a-theological transcendence that makes a political-legal reflection of the transcendental dimension possible, even under the contemporary condition that "God is dead." This is a bold and powerful thought and introduces into legal thought a difference that makes a difference.

However, I do not share the juridical Derridians' optimism that such an experience of law's transcendence would inspire or even guide political and legal activism. I do not deny that it makes an important difference in the practice of politics and law—extreme demands of a justice that can never be realized, the almost unbearable experience of an infinite responsibility, a sense of fundamental failure of law, even a tragic experience that whatever you decide in law will end in injustice and guilt. But how should this experience ever guide political legal action in

14 "The law is transcendent and theological, and so things come, above prov en, because it is immanent, finite and so already past" (Deray, 1996:95).
the sense of designing legal rules of minority protection, immi-
grants' and women's rights.

Duccilla Cornell sometimes relies on the dimension of time (Cornell 1990:1052). Justice does not reveal itself before the fact. But does she do so post hoc? Is there any judge for the infinite responsibility within a reasonable amount of time? Are not the demands of justice forever indecipherable? Is not the justice it-
word, which means forever advance and forever present or past? The instrumentalization of deconstructive justice for political and doctrinal purposes means to decenter it, to level the deep di-
vide between legal-political immanence and transcendence.

Does Derrida's own deconstruction of Levinas help (Derrida 1978)? He argues against Levinas that ethical asymmetry is in danger of being reduced to an excuse for domination and vio-
ence if it is not supplemented by phenomenological asymmetry. The Other needs to be recognized phenomenologically as alter ego. But what else than a vague humanitarian impulse can one expect for law from phenomenological asymmetry as deconstruc-
tion of the philosophy of alterity? I cannot see how such a "deconstructionism with a human face" will give any meaningful orientation in the face of the urges question how law copes with the demands of justice in today's supercomplex society. It is not by chance that the legal and political implications of deconstruc-
tion restrain themselves wisely to the eternal simple conflict be-
tween minorities and the state where it is relatively easy to be parti-
arian (Cornell 1992a; 1990:1034f., Douslin and Warrington 1994chs. 4, 6). But they remain silent when it comes to conflicts between human rights, not to speak of collisions between incom-
possible worlds of meaning. And even if we insist on the funda-
mental divide between law and justice that denies that justice can be translated into law, do we not need to search for an adequate conceptualization of the human condition at the end of the 20th century that tells us more about our society than a mere mystical appeal to alterity? It seems that even the most "ethical" inter-
pretation of "affirmative" deconstruction remains caught in the par-
adoxal relation between an immanent law and transcendental justice (cf. the critique by Velmans 1992:24f.).

What is needed is a self-transcendence of deconstruction it-
self. It is interesting to note how deconstructionism explicitly
avoids self-application. It refuses to apply its operations to its own
core distinctions. It grants itself a strange self-exemption that is
the very cause of its paralysis. 'Justice in itself, if such a thing exists', outside or beyond law, is not deconstructible. No more
than deconstruction itself, if such a thing exists? (Derrida 1990:94f.).

The deconstructive dance, if such a thing exists, may over-
come its paralysis once it acknowledges that deconstruction itself
can be deconstructed. Paradoxification itself is a paradoxical ap-

eration. In its oscillations it has two sides. On its "logical" side, it oscillates between the positive/negative value of the distinction and paradoxes the observer. On its "rhetorical" side, it oscillates between paradoxification and deparadoxification. And it is time, the temporalization of the paradox, that leads out of permanent oscillation. It shows what the game of deconstruction is about: an almost rhythmically pulsating movement from hiding the paradox, to revealing it, to hiding it again. . . . Thus, deconstruction need not remain the dance of paradox, rather it may turn out to be the very provocation for inventing new distinctions! Deconstructible distinctions, of course! Discourses that for the time being hide the paradox anew and await its future revelation.

Returning to our example, the law of private governments in the global society, where is the new hiding place for the founding paradox of law to be found once the protective rule hierarchy has been deconstructed? If we take the risk of inventing deconstructible unfoldments of the paradox of law, should we search for it in the direction of a "polycontextual" law that would not be hierarchic, but hierarchical, a law with multiple sources, a law without a unifying perspective, a law that is produced by different mutually exclusive discourses in society (Grether 1978)? Law remains the same but appears as different depending upon the diverse social discourses that "produce" it. The same is different. The traditional hierarchical differentiation of law into legislation and adjudication would be replaced by a hierarchical multitude of legal orders structurally linked to other discourses. Those links would a circular self-referential way be connected to each other. Political legislation loses its privileged place and becomes just one peripheral mode of lawmaking among other forms of plural law production. The patchwork of ethnic and religious minority laws, rules of standardization, professional discipline, contracting, intra- and interorganizational rule making—all the different modes of Michel Foucault's (in)famous "normalization" (Foucault 1977:ch. 3, 9)—would be equally valid forms of law production. Thus, the founding paradox of law hitherto hidden in the one great fiction of the Political Sovereign would now be dissolved into a multiplicity of paradoxes of self-validation. The One King has Two, Three, Four, . . . Many Bodies! The multiplicity of polycontextual law hide their paradoxical self-qualification in an "as if." Each of them has its own fictitious founding myth. None of them has a clear-cut historical beginning. Rather, the beginning is in the middle! It is like in the famous "Glas" by Jacques Derrida (1974) where the text has no beginning and ends in the middle of a store for the reader already started. The recursive operations of each of these polycontextual laws cannot begin or ends; they can only refer to something that already exists. But due to their very recursivity they cannot
refer to something outside of their chain of recursion; it must be something within this chain to which they refer. And if this "nothingness" does not exist, they have to invent it! These laws as means of recursive legal operations can only refer to past legal operations. The solution again is "as if," but not the fiction of a founding myth as a self-observation, rather as the fiction of past legal decisions as bases for recursive operations.

IV. Elective Affinities: Legal Semantics and Social Structure

What gives us the certainty that such a concept of "polycontextura" law is not in its turn susceptible to philosophical deconstruction? Or, worse, that it will not be the victim of its own self-deconstruction? Nothing, of course. And one thing is certain—

that it can be deconstructed. Post-deconstructive distinctions are not immune against their deconstruction; they are themselves deconstructible. But the crucial question is: What are the conditions for their temporal stability? This is the point where second-order observation goes beyond deconstruction; insofar as it observes how the risk of an deconstructible unfolding of the paradox is taken. Who is the observer who takes this risk? When? Under what social structural conditions?

Here, sociology of law comes in a second time. Now, it is no longer the question of what are the historical conditions for law's self-deconstruction; in other words, the question: Where do law's operations clash with its observations so as to make the paradox visible? Rather, a sociological analysis would introduce here the elective affinity between legal semantics and broader social structures in order to explain it and why the "unfoldment" of the paradox has a certain social plausibility. Indeed, it is the spectre of Marx that is haunting us here, with its tried of modes of production, class structure, and law as one among several ideologies. The new triad—differentiation, social structure, and legal semantics—makes it clear that contemporary society is the result of a structural and semantical catastrophe. The catastrophe happened in modernity, and postmodernity's fate is to become painfully aware of its negative consequences.

If this is so, the deconstruction of our metaphysical axioms is something we can do now. But so, it would be worthwhile to choose the instruments of deconstruction with sufficient care in such a way that by using them we could gain some information about our postmetaphysical, postontological, postmemorialist, postmodern—that is, postmetaphysical condition. (Lehmann 1995:77; emphasis omitted)

This would be the step beyond Derrida's recommendation of "walking through the desert," the "necesarily indeterminate abstract, desirable experience that is conflicted exposed, gives up
to its waiting for the other and for the event" (Derrida 1994:60).
He maintains that in spite of the unbridgeable gap between do-
ing justice to the uniqueness of the Other and the calculations of
law that deconstruction reveals, one nevertheless should con-
tinue the search for justice and "negotiate" the uniqueness with
the generality, objectivity, calculability of law. But here is the
source for the parabolic. Deconstruction itself cannot furnish cri-
teria (Vissmann 1992:264). This leads to the unmediated confron-
tation of a deconstructed law with the infinite demands of Jus-
tice. Law in ruins is haunted by the specter of Justice. In such a
situation what can one expect from "negotiation"?

Derrida criticizes Benjamin's appraisal of divine violence
which human beings cannot distinguish from mythic violence
(Derrida 1990:105ff). 'Ta pasque, Inomu! He exposes himself to
a similar critique. In spite of all recurrent appeals to negotiation,
deconstruction leaves us in a situation of an unbearable responsi-
bility. "Before the law" of deconstructionism, we live under the infi-
nitei heavy demands of an inaccessible authority the commands
of which we cannot decipher. Derrida puts himself under the ob-
ligation of a promise: "And a promise must promise to be kept,
that is, not to remain 'spiritual' or 'abstract', but to produce
events, new effective forms of action, practice, organization, and
so forth" (Derrida 1994:89). 13

But is it not very convincing to appeal—as Derrida does—to
second-best solutions if he cannot say anything about the direc-
tion into which one should move "negotiations" and "com-
promises." Are such empty criteria of second best all that's left
after deconstruction?

Against this, the instruments of deconstruction would need
to be directed not only at revealing the multitude of meaning
and the underlying paradox and to confront this with the haunt-
ing demands of an ever distant justice, but also at finding out
something about the situation after the catastrophe, in the
Master's voice, and at formulating what the intended "maximum
intensification of a transformation in progress" could virtually
mean in an "industrial and hypertechnologized society" (Derrida
1990:935). And for this purpose it is important to see that after
deconstruction, not only is one exposed to the unbridgeable gap
between a deconstructed law and a transcendental justice that al-
lows only bad compromises and negotiations but also to the pos-
sibilities of new distinctions creating worlds of meaning that
would mediate between deconstructed law and deconstructing
justice. What would a possible new correlation between social
structures and legal semantics look like that allows at least for
a transitory deparadoxification? What are the forms of social differ-

13 Derrida often expresses among self-obligations for political action as a conse-
quency of deconstruction activities, e.g. Derrida 1990:93-94.
relation that give a temporary plausibility and social acceptability for new legal distinctions.

Apart, law’s globalization seems today to be the key to understanding the differentiation of a social structure that tolerates a different legal semantics which would sufficiently displace and conceal law’s paradox, a feast for the time being. Globalization breaks the link connecting law to the democratically constituted political discourse. It exposes law directly and without the mediation of democratic politics to the fundamental social condition of today’s world society: to its “double fragmentation” — cultural polycentrism and functional differentiation (Sinha 1995; Lohmann 1995a). This may give a sociological direction to the search for post-deconstructive distinctions. One would look for legal semantics that reflect and endorse this double fragmentation. The search is for legal distinctions that will not be undermined by polycentricity but will rather take it for granted and build on it. “Um societies Ih las” (Grotius). What does law look like in a doubly fragmented world society?

Let us have a closer look at our King’s Many Bodies. Could it be that the post-deconstructive concept of polycentric law, the laws of the many discursive sovereigns, has an elevating affinity to this double fragmentation of world society? Does a polycentric legal system meet the conditions of historical plausibility and social acceptability in times of globalization? How can one be sure whether polycentric law is not in itself a regression to pre-deconstructive concepts? I have only preliminary answers: One is “transnational operations” another is multiple externalization of the paradox.

A first tentative answer might be found in the “transnational operations” that constitute different forms of law where there is no political sovereignty. The structural reason for such political law production is “that on the global level there is no correspondence for the structural coupling of politics and law via a constitution” (Lohmann 1993c:887). Thus a different logic of norm production aid of legal argumentation is required: “A legal theory in line with the times ought to resist itself and its concepts to a hierarchically relational logic of linkage, if it’s to find the functional equivalent to the stable relations between subject and general reason, between individual case and norm” (Ladeur 1995).

Under conditions of the multinational state and private governance regimes are wrenched politically mediated when they are to be transformed into valid legal rules. Under conditions of globalization however, private governance regimes lose this institutional and legitimating mediation and can be institutionalized only as forms of a close context between operationally closed systems, without mediation by institutionalized politics. These are institutions—I call
them "linkage institutions"—that create new law directly by transjunctural operations without being translated into political issues. In their ongoing procedures they operate in terms of more than one binary code which they treat with conjunctural and disjunctural operations. They operate—within one institution but over the boundaries of two or more operationally closed social systems—with several binary codes and connect them through transjunctural operations (Günther 1976a). They create a rejection value that negates the unity codes as such. They contain "a deeper two-valuedness that reaches on the classical opposition of positivity and negativity and contains it as a special case. This further transcultural two-valuedness is the alternative between acceptance and rejection value" (Günther 1976a:28).

For example, one might look at technical standardization, where such standards are elaborated in the frame of the true/false distinction of science. Then the rejection value is introduced against the acceptance value of the scientific binary code. This opens the road to a multiplicity of other codes. The standard is "translated" into the economic, political, ecological, or legal discourse. It is reconceptualized in the languages of those discourses and takes on different meanings (antonym substitution; Holmes 1987:258). Thus, linking institutions have the capacity to take into account the multivalued character of a fragmented society. However, with the interplay of binary codes on one level and acceptance and rejection value on another level, the linking institutions still work with manageable binary distinctions since they create multiple different layers of a two-valuedness. Thus, we have in the case of linkage institutions a semantics of law that seems to be calibrated directly to the double fragmentation of world society.

Another answer might be found in the multiple externalization of paradoxes. The paradoxes of so-called valuation would not vanish but would be concealed by being externalized to the social practices with which they have close contact. Polycultural legal externalize their paradox by creating their own myths of origin. These are fictions of their foundation which are based, nevertheless, on ongoing outside processes.

It is the fragmented order of diverse discourses outside of the law where we find the external, on which the fictions of polycontextual law depend. It is a perspective that allows the experiential experience where the client, to escape the circularity of self-reference, invents a fictitious hetero-reference in the person of the therapist to whom the full knowledge of the symptom is attributed. Zizek's analysis applies similarly to the emergence of polycontextual law:

it is only the illusion of a prior knowledge that in the end produces actual knowledge. Here lies the fundamental paradox of the signifying process. The only possibility of creating new
meaning is to go through the illusory premise that this knowledge already exists. (Zisk 1992:IV.2.5)

There must be enough nonlegal meaning material that law can misunderstand as legal precedent. There must be a historical "situation in which it is sufficiently plausible to assume that also in former times legal rules have been applied" (Luhmann 1993c:57). An example would be an international transaction that has taken place outside the frame of any national contract law. The strange fiction is that its expectations are law which needs to be judged according to an existing legal order. *La mercatoria* refers either to a rich fund of commercial practices, which has evolved under the chaotic conditions of the global market or should one say, to the practices that have been imposed by the stronger economic interests. At present, in an arbitration context, lawyers pretend that these merely social expectations are the law to which legal decisionmaking can refer as precedents. Arbitrators in commercial disputes pretend that all arbitration cases decided according to equity are precedents for them and begin to distinguish and to override. The paradox of contractual self-valuation can now be hidden in the infinite history of age-old commercial stages.

In a similar vein, organizational patterns and routines have evolved within a multinational organization. The fiction is created that these rules are labor law. The paradox of its self-validation will be concealed in the routines of an organizational hierarchy. Equally, an enterprising inhabitant of cyberspace delineates a limited chunk, demands money for access, and pretends to have created legal property. Such are historical situations in which polycrystalline law creates its recursivity based on fictitious precedents and conceals its paradox in nonlegal decency.

V. The King’s Mass Bodies Are Invisible

How would this image of a continual paradoxification and deparadigmaticity of law change the perception of basic institutions of law? Can we develop normative perspectives of those institutions’ transformations in a post-deconstructive spirit?

It would be tempting to declare law’s major task as Making the King’s Many Bodies Visible. Haunting the new Isodemic naming, blaming, claiming—the attribution of lawmaking creates a new visibility. There are tendencies in legal pluralism that indeed point in this direction.88 "Private governments" have deficiencies in their public character, but they can be made accountable. "Quasi-political regimes" are dictatorial, but they could be made

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more democratic. "Nongovernmental actors" behave irrespon-
sibly, but they could be made responsible for their actions.

However, here the otherwise fruitful metaphor of the King's
Many Bodies seems to become misleading. It is fruitful insofar as
it reveals the multiplicity of fictions that have replaced the one
great fiction of the law-producing Sovereign. But it becomes mis-
leading if it makes us think that double fragmentation of the
world society means that political power on the global level is
nothing but decentralized, that legislative sovereignty is only dis-
persed in identifiable decision-making centers. This would be an-
other regression to pre-deconstructive distinctions, this time not
of a moral but of a political character. It would support the
wrong analogy to political sovereignty: action, power, influence,
manipulation, responsibility.

Like the self-deconstruction of law's hierarchy, we must face
the self-deconstruction of political power, domination, and sover-
eignty in the world society. The autopoietic deconstruction
makes us see world society as a society without hierarchy and
without a sovereign. To be sure, world society is rife with violence
and repression, but it is not a society steered by political domina-
tion. The result of globalization is not just a multiplication of
sovereigns producing laws for their little domains. Rather, global
law is dominated by its blind environments, by the systems of its
inner societal environment. And the decisive thing is that this
dominated does not work in a politically attributable and ac-
countable way, rather

The project is the replacement of hierarchy—and autonomy—by
hierarchy. This means that askhi (mastery) is located neither
at an uppermost level—it is not hierarchy, mastered by name
and for the sake of the body (san absolute and externally given
quality)—nor within the system itself—it is not autarchy, self-
mastery or self-sufficiency. Askhi (mastery) is located outside
and in front of the system, that is, just beyond the system's bor-
ders with its accompanying others or others. The role of the ac-
companying other, or partner or enemy of hierarchy, is per-
formed not by the environment—which cannot perform any role—but by other systems present in the system's environ-
ment. Yet, even this relationship is structured by the distinction
system/environment. If one deals in systems only, hierarchy
would be unacceptable. Hierarchy is, of course, a paradoxical
mastery—mastery without a master. (Schütz 1967:27)

If this is so, then a "constitution" for polycentrical law can-
not simply extend the historical experiences of the political con-
stitutions per analogiam. Garbing abuses of power; that great
formula of the legal tradition will not help in "civilizing" the
King's Many Bodies. We must face the impossibility of constitu-
tionalizing legal multiplicity in the language of legal restraints on
the arbitrariness of the sovereign.
The new reality, it is true, is lack of a substantive lack of society's comprehensive political rationality, however, systems theory would urge us to realize that in spite of all deconstruction, social subsystems redenominally stick to their institutionalized "iron law" of superspecialized rationalities. They are highly rational in themselves, but with regard to the whole society they are blind, uncoordinated, selfish, chaotic, expansive, and imperialistic. In its double fragmentation, worst society tends to develop self-destructive tendencies. Thus, a "constitutions" for polycentrally structured law would need to redefine its focus: from the sovereignty of politics to the domination of the many environments and from the sovereignty's abuse of power to self-destructive tendencies of colluding discourses.

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